

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF LABOR AND INDUSTRY

In the Matter of the Rescission Order
Issued to James and Mavoureen Albright
Contractor Recovery Fund Case Number
2900052

**FINDINGS OF FACT,
CONCLUSIONS
AND ORDER**

The above-entitled matter came on for a hearing before Administrative Law Judge Eric L. Lipman at 9:30 a.m. on August 25, 2009, at the Saint Paul offices of the Office of Administrative Hearings. The hearing record closed at the conclusion of the evidentiary hearing.

Nancy Leppink, General Counsel, Minnesota Department of Labor and Industry (the Department), appeared on behalf of the Department. Carrie A. Doom, Parker, Satrom & Donegan, P.A., appeared on behalf of the Respondents James and Mavoureen Albright (Respondents).

STATEMENT OF ISSUE

The issue presented in this case is whether, under Minn. Stat. § 326B.89, subd. 7, the Department properly issued its Rescission Order dated July 5, 2009.

The Administrative Law Judge concludes that the Commissioner exceeded his authority when he rescinded the Settlement Agreement with the Respondents and therefore vacates the July 5, 2009 Rescission Order.

Based upon all of the files, records and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. In October of 2007, the Albrights purchased a 1974 split-level house and had it relocated to their property in Stanchfield, Minnesota. The couple intended to move into the house once a foundation was laid, basement installed, and other remodeling work performed.¹

¹ Testimony of James Albright; Exhibit C.

2. The Albrights' existing home is a 120 year old farm house that has black mold and other significant problems. The Albrights intended to have their existing home demolished once construction on the new home was completed.²

3. The furnace in the Albrights' current home has recently been "red-tagged" and cannot be operated this winter. The family lacks the resources to purchase a new furnace.³

4. In October of 2007, the Albrights entered into a contract with Zum Builders & Remodelers, LLC (Zum Builders), under which Zum Builders agreed to act as the general contractor for the installation of the basement and retrofitting of the home that the Albrights purchased. The agreed-upon work included: laying the foundation for the basement; installing the basement floor and walls; installing plumbing, a furnace, septic system, electrical wiring, drywall, siding, doors and windows; and demolishing and removal of the Albrights' existing home. Under the terms of the contract, for the sum of \$50,000, Zum Builders agreed to complete all of the necessary work by May 1, 2008.⁴

5. Zum Builders is a Minnesota Limited Liability Company owned and operated by James Zumwalt. Mr. Zumwalt is the cousin of Albrights' daughter-in law.⁵

6. From September 14, 2005 until March 31, 2009, Zum Builders was licensed by the Department as a residential contractor. Zum Builders did not apply to renew its license when it lapsed in 2009.⁶

7. As of January 5, 2008, the Albrights had paid Zum Builders the sum of \$43,000 for the agreed-upon construction work.⁷

8. By October 2008, Zum Builders had only partially performed under the contract. It had poured the basement's concrete floor, roughed-in the entryway, and installed approximately 80 percent of the framing and plumbing. The work the entryway, however, does not meet the applicable building codes.⁸

9. On October 22, 2008, the Albrights filed a breach of contract claim against Zum Builders alleging damages in excess of \$50,000.⁹

² *Id.*

³ *Id.*

⁴ Exs. A and C.

⁵ Test. of J. Albright.

⁶ Exs. 2 and 3.

⁷ Ex. A (Attachment 8).

⁸ Ex. A (Attachment 2).

⁹ Ex. A (Attachment 5).

10. Shortly after filing the lawsuit, the Albrights and their counsel were informed by Mr. Zumwalt that he intended to file for bankruptcy.¹⁰

11. On January 2, 2009, Mr. Zumwalt signed a Confession of Judgment on behalf of Zum Builders acknowledging that it owed the Albrights \$37,725.41. Contemporaneously with the execution of the Confession of Judgment, the Albrights and Zum Builders entered into a Settlement Agreement whereby the Albrights agreed to file a Satisfaction of Judgment if they received compensation from the Minnesota Contractor's Recovery Fund.¹¹

12. The terms of the January 2, 2009 Settlement Agreement between the Albrights and Zum Builders provides in part:

- (a) Contemporaneously with the execution of this Settlement Agreement, [Zum Builders] shall execute and deliver to [Albrights' attorney] a Confession of Judgment in the form attached as Exhibit A.
- (b) [The Albrights] shall not take any action to enforce the Confession of Judgment directly against [Zum Builders]. Rather, the Confession of Judgment shall only be used for purposes of recovering from the Minnesota Contractor's Recovery Fund.
- (c) [Zum Builders] agrees to cooperate fully with [the Albrights'] efforts to collect from the Minnesota Contractor's Recovery Fund. [Zum Builders] further agrees that if the Confession of Judgment attached hereto as Exhibit A is deemed insufficient by the Minnesota Contractor's Recovery Fund, [Zum Builders] agrees to execute an amended Confession of Judgment incorporating any and all terms by the Minnesota Contractor's Recovery Fund.
- (d) Within thirty (30) days of receipt by [the Albrights] of all funds, if any, due and owing from the Minnesota Contractor's Recovery Fund, [the Albrights] shall file a Satisfaction of Judgment on the Confession of Judgment.

In exchange, [the Albrights and Zum Builders] mutually irrevocably and unconditionally release, remit, acquit, and agree to hold harmless and discharge each other from all actions, causes of action, suits, debts, claims, liabilities, damages, and demands of every kind and nature, including any and all arbitrations, administrative or license proceedings, whether in law or in equity, contract or tort, known or unknown, which they or their respective

¹⁰ Test. of J. Albright; Ex. A (Attachment 4); Ex. F.

¹¹ Ex. A (Attachment 2); Ex. J.

representatives, administrators, successors, or assigns, now or hereafter may have, or claim to have, against each other or their respective representatives, administrators, successors, or assigns relating to any and all claims, including those listed in [the Albrights'] complaint dated October 24, 2008, or the facts and circumstances underlying all actions contained therein.¹²

13. Based upon Zum Builders' Confession of Judgment, on January 9, 2009, the District Court for Isanti County entered a judgment in favor of the Albrights. The judgment was in the amount of \$37,725.41.¹³

14. The record does not include any evidence that either Mr. Zumwalt or Zum Builders has filed for bankruptcy.

15. Because construction of the foundation and basement was not completed on the Albrights' house, the house is uninhabitable and cannot be certified for occupancy. In addition, all of the building permits that were obtained for the construction project have expired. The Albrights lack the resources to obtain new permits or to hire another contractor to complete the work.¹⁴

16. On January 12, 2009, the Albrights filed an Application for Compensation from the Contractor Recovery Fund. The Albrights attached a copy of the Confession of Judgment and the final Judgment obtained in Isanti County District Court. The Albrights requested compensation in the amount of \$37,725.41.¹⁵

17. The Albrights did not submit a copy of the settlement agreement with Zum Builders with their application of January 12, 2009.¹⁶

18. Disbursements from the Contractor Recovery Fund are made once each year, on or around December 1. Applications for compensation from the Contractor Recovery Fund must be submitted before June 30, in order to be eligible for a disbursement on December 1. An application received by the Department after the June 30 deadline is considered for possible disbursement in December of the following calendar year.¹⁷

19. After requesting further documentation from the Albrights, the Department approved compensation from the Fund for the Albrights in the amount of \$28,672.52.¹⁸

¹² Ex. J.

¹³ Ex. A (Attachment 3).

¹⁴ Test. of J. Albright.

¹⁵ Ex. A (Attachment 1).

¹⁶ Ex. A.

¹⁷ See, Minn. Stat. § 326B.89, subd. 9; Testimony of Eileen McNiff.

¹⁸ Exs. D and E.

20. By letter dated March 5, 2009, Eileen McNiff, the Contract Recovery Fund Administrator, notified Albrights' counsel of the compensation amount that was approved and attached a Settlement Agreement and Order for Albrights to review and sign. The Settlement Agreement was signed by Peggi White of the Department's Construction Codes and Licensing Division, on behalf of the Commissioner, on March 5, 2009. As recited in the Settlement Agreement and Order, it was "effective and deemed issued" on that date.¹⁹

21. Paragraph 11 of the Settlement Agreement, provides as follows:

Upon payment of compensation to Applicants from the Fund, the Commissioner shall be subrogated to all of the rights, title and interest in Applicant's final judgment in the amount of compensation paid from the Fund. Applicants shall assign to the Commissioner all rights, title, and interest in the final judgment in the amount of compensation paid. See, Minn. Stat. § 326B.89, subd. 10. Applicants and the Commissioner agree that Applicants shall provide an executed and notarized Assignment of Judgment to the Commissioner within 15 days of the date compensation from the Fund is mailed to Applicants in accordance with this Settlement Agreement and Order.²⁰

22. The Albrights signed the Settlement Agreement and Order on March 11, 2009.²¹

23. By letter dated May 20, 2009, Ms. Doom notified Ms. McNiff of the Settlement Agreement between the Albrights and Zum Builders; and in particular, the Albrights' agreement to deliver a Satisfaction of Judgment upon receipt of compensation from the Contractor Recovery Fund. Ms. Doom inquired whether it was the Department's opinion that the Settlement Agreement between the Albrights and Zum Builders would need to be "reformed" before the Fund could pay out the Albrights' compensation.²²

24. On July 7, 2009, Ms. Doom again wrote to Ms. McNiff and requested a response to her May 20, 2009 letter.²³

25. By letter dated July 15, 2009, Ms. McNiff informed Ms. Doom that the Fund had determined that the Albrights agreement to deliver a Satisfaction of Judgment to Zum Builders rendered them ineligible for compensation from the Contractor

¹⁹ Ex. D; Ex. E at ¶ 12.

²⁰ Ex. E at ¶ 11.

²¹ Ex. E at 5.

²² Ex. F.

²³ Ex. G.

Recovery Fund. Further, Ms. McNiff enclosed an Order from the Department rescinding the March 5, 2009 Settlement Agreement and Order. Ms. McNiff stated that if the Albrights corrected this deficiency, they could submit a new application for compensation to the Fund.²⁴

26. The Rescission Order provides in part:

Based on the representations in Ms Doom's letter, the Commissioner has determined that the Applicants, by entering into the agreement described, can not currently comply with the requirements of Minn. Stat. § 326B.89, subd. 10, as set out in paragraph 11 of the Settlement Agreement, and therefore, the Commissioner hereby rescinds his Order, which ordered payment in the amount of \$28,672.52 to James and Mavoureen Albright from the Fund.²⁵

27. The Rescission Order included a notice informing the Albrights of their right to request a hearing.²⁶

28. On August 6, 2009, the Albrights requested a hearing.²⁷

29. On August 12, 2009, the Department filed a Notice and Order for Hearing. On August 13, 2009, the Department filed an Amended Notice and Order for Hearing correcting typographical errors and setting this matter on for hearing on August 25, 2009.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner are authorized to consider this matter under Minn. Stat. §§ 14.50 and 326B.89, subd. 8 (2008).

2. Albrights received due, proper and timely notice of the hearing and this matter is, therefore, properly before the Administrative Law Judge.

3. The Department has complied with all relevant procedural legal requirements.

²⁴ Ex. H.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Ex. I.

4. The purpose of the Contractor Recovery Fund is to compensate eligible homeowners and lessees who have suffered economic loss as a result of a licensed contractor's fraudulent or deceptive practices, or failure to perform under a contract.²⁸

5. To be eligible for compensation from the Fund, a homeowner or lessee shall submit an application to the Commissioner and verify the following information:

- (a) the specific grounds upon which the owner or lessee seeks to recover from the fund;
- (b) that the owner or lessee has obtained a final judgment in a court or competent jurisdiction against a licensee under section 326B.803;
- (c) that the final judgment was obtained against the licensee on the grounds of fraudulent, deceptive, or dishonest practices, conversion of funds, or failure of performance that arose directly out of a contract directly between the licensee and the homeowner or lessee . . . ;
- (d) the amount of the owner's or lessee's actual and direct out-of-pocket loss on the owner's residential real estate . . . ;
- (e) that the residential real estate is located in Minnesota;
- (f) that the owner or the lessee is not the spouse of the licensee or the personal representative of the licensee;
- (g) the amount of the final judgment, any amount paid in satisfaction of the final judgment, and the amount owing on the final judgment as of the date of the verified application;
- (h) that the owner or lessee has diligently pursued remedies against all the judgment debtors and all other persons liable to the judgment debtor in the contract for which the owner or lessee seeks recovery; and
- (i) that the verified application is being served within two years after the judgment became final.

6. Minn. Stat. § 326B.89, subd. 6, provides that a homeowner or lessee may submit an application for compensation "regardless of whether the final judgment has been discharged by a bankruptcy court."

²⁸ Minn. Stat. § 326B.89, subd. 4.

7. The Albrights satisfied the eligibility requirements for compensation under Minn. Stat. § 326B.89, subd. 6.

8. Minn. Stat. § 326B.89, subd. 7, provides that upon receipt of an application for compensation from the Contractor Recovery Fund, the Commissioner shall enter into an agreement with the homeowner or lessee that resolves the application or issue an Order to the homeowner or lessee “accepting, modifying, or denying the verified application for compensation from the fund.”

9. The Commissioner is not authorized to pay compensation from the fund in an amount greater than \$75,000 to any particular homeowner or lessee, and further is limited to a total set of disbursements of not more than \$150,000 to the customers of each defaulting licensee.²⁹

10. Minn. Stat. § 326B.89, subd. 7, provides that when making disbursements from the fund to injured claimants, the Commissioner “shall not be bound by any prior settlement, compromise, or stipulation between the owner or the lessee and the licensee.”

11. Minn. Stat. § 326B.89, subd. 10, further provides:

Right of subrogation. If the commissioner pays compensation from the fund to an owner or a lessee pursuant to an agreement under subdivision 7, clause (1), or a final order issued under subdivision 7, clause (2), or subdivision 8, then the commissioner shall be subrogated to all of the rights, title, and interest in the owner’s or lessee’s final judgment in the amount of compensation paid from the fund and the owner or the lessee shall assign to the commissioner all rights, title, and interest in the final judgment in the amount of compensation paid. The commissioner shall deposit in the fund money recovered under this subdivision.

12. Pursuant to the terms of the Settlement Agreement and Order, the Albrights are required to assign their judgment against Zum Builders to the Commissioner within 15 days of the date that compensation is mailed to the Albrights.³⁰

13. After the Settlement Agreement was executed by the Albrights on March 11, 2009, the Commissioner lacked the authority to unilaterally rescind the Agreement.

14. The March 5, 2009, Settlement Agreement and Order remain in effect and are affirmed.

15. The Albrights are obliged to assign all of their rights, title and interest in the final judgment against Zum Builders as provided in the Settlement Agreement.

²⁹ See, Minn. Stat. § 326B.89, subd. 7.

³⁰ Ex. E at ¶ 11.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

- (1) The Rescission Order of July 15, 2009 is VACATED.
- (2) This Order constitutes the final decision in this matter and is effective immediately.

Date: September 24, 2009.

s/Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

Reported: Digitally recorded.

NOTICE

Pursuant to Minn. Stat. § 326B.89, subd. 8, this order constitutes the final decision of the agency in this case. The Commissioner of the Department or any person aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

MEMORANDUM

The Department argues that the Albrights are not eligible for compensation from the Fund because their separate agreement with Zum Builders renders the Albrights unable to “assign to the commissioner all rights, title and interest in the final judgment in the amount of compensation paid.”³¹

While mindful of the Department’s concern regarding the Albrights’ willingness to tender a Satisfaction of Judgment to Zum Builders, there is a threshold issue – namely whether the Commissioner is empowered to rescind a Settlement Agreement and Order once it has been finalized. In the view of the Administrative Law Judge, the Minnesota Legislature has withheld the power to unilaterally rescind a Settlement Agreement and Order under Minn. Stat. § 326B.89. The Legislature has addressed the Commissioner’s concerns in other ways. A few points deserve emphasis.

Upon receipt of an application for compensation from the Contractor Recovery Fund, the Commissioner may choose one of three options. The Commissioner may accept the application, modify the application or deny the application. Because the Minnesota Legislature was specific as to the three possible alternatives, the familiar canon of statutory construction instructs that “the expression of one thing indicates the [Legislature’s] exclusion of another.”³²

The conclusion that the Legislature did not confer the power of rescission is bolstered by the fact that the Legislature has granted this power to other executive branch agencies when it intended that result.³³

Moreover, the Legislature addressed the potential that applicants might act to impair the subrogation rights of the Commissioner when it enacted the statute. Instead of conferring the power to rescind completed agreements, the Legislature granted the Commissioner special rights of recovery that cannot be reduced by the applicants. Minnesota Statutes § 326B.89, subd. 7, provides that when making disbursements from the fund to injured claimants, the Commissioner “shall not be bound by any prior settlement, compromise, or stipulation between the owner or the lessee and the licensee.” Implying the power to rescind a fully executed agreement is inappropriate in this context. The Legislature already freed the Commissioner from the strictures of any accords between the owner and the licensee.

Likewise important is the fact that when the Commissioner uses his powers under section 326B.89, both the Legislature and the Department understand that he is

³¹ Minn. Stat. § 326B.89, subd. 10.

³² See, *Urban v. The American Legion Department of Minnesota*, 723 N.W.2d. 1, 5-6 (Minn. 2006); *Nelson v. Productive Alternatives, Inc.*, 715 N.W.2d. 452, 456-57 (Minn. 2006).

³³ Compare, e.g., Minn. Stat. § 17.117, subd. 9; Minn. Stat. § 216B.241, subd 1a (d); Minn. Stat. § 270C.37, subd. 3.

“resolving” disputed claims to the Contractor Recovery Fund.³⁴ The rescission of fully executed settlement agreements is disfavored in the law³⁵ – and is ordinarily permitted only when there is fraud or intentional concealment of a fact that is material to the transaction.³⁶

The Department’s argument pivots on the claim that the Albrights will not be able to assign to the Commissioner all rights, title and interest in the final judgment if a disbursement is made from the Fund. While this may be a reasonable concern, the impossibility of performance is not established on this record. Particularly in light of the fact that the Albrights and Zum Builders fashioned their separate agreement so as to respond to the deficiencies later claimed by the Department, a revised agreement between the owners and the licensee is a fair possibility.

Because the Commissioner is not empowered by Minn. Stat. § 326B.89 to rescind a Settlement Agreement and Order once it has been finalized, the Rescission Order of July 15, 2009 is vacated.

E. L. L.

³⁴ Compare, Minn. Stat. § 326B.89, subd. 7 with Ex. E.

³⁵ See, *Johnson v. St. Paul Ins. Cos.*, 305 N.W.2d 571, 573 (Minn. 1981); *Beach v. Anderson*, 417 N.W.2d 709, 711-712 (Minn. App. 1988).

³⁶ See, *Gran v. City of St. Paul*, 143 N.W.2d 246, 248-49 (Minn. 1966); *Keller v. Wolf*, 58 N.W.2d 891, 895 (Minn. 1953); *Becker v. Bundy*, 225 N.W. 290, 417 (Minn. 1929).